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CITATIONS

Cases:

Franks Bros. Co. v. *National Labor Relations Board*, 321 U.S. 702 — 9

International Ladies' Garment Workers Union v. *National Labor Relations Board*, 366 U.S. 731 — 9

National Labor Relations Board v. *Katz*, 369 U.S. 736 — 9

National Labor Relations Board v. *P. Lorillard Co.*, 314 U.S. 512 — 9

National Labor Relations Board v. *Progressive Mine Workers*, No. 597, this Term, reversed on petition January 6, 1964 — 9

Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 — 7

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 8(a)(1) — 7, 8, 9, 11

Section 8(a)(3) — 11

Section 8(a)(5) — 11

Section 9(a) — 11

718-132—64

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 685

SKYLINE HOMES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15–27) is not yet reported. The Board's decision and order (R. 67–79) are reported at 134 NLRB 155.

JURISDICTION

The decision of the court of appeals (Pet. 15–27) was entered on October 11, 1963, and a petition for rehearing was denied on November 13, 1963 (Pet. 33). The decree (Pet. 33–35) was entered on November 22, 1963. The petition for a writ of certiorari was filed on December 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner interrogated and threatened its employees in violation of Section 8(a)(1) of the National Labor Relations Act, and refused to bargain with the representative chosen by a majority of its employees in violation of Section 8(a)(5).

2. Whether the Board properly ordered petitioner to bargain with the Union upon request despite the turnover in employees which had occurred since the commission of the unfair labor practices.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth in the Appendix, *infra*, p. 11.

STATEMENT

a. *The Board's findings of fact.*—Petitioner manufactures mobile homes, commonly known as trailers. In May 1960, it moved to a new plant in Ocala, Florida, and, between June 1 and 17, it hired 15 additional employees (R. 36, 39, 71).[1] On June 11, employee Bruce Lloyd contacted Union[2] Representative J. W. Wells, and obtained a supply of union authorization cards from him (R. 40; B.A. 80, 81, P.A. 47a). By June 17, Lloyd had obtained signatures on the cards from 17 of the Company's employees (R. 68, 40;

[1] "R." refers to the transcript printed for the use of the court of appeals. "P.A." and "B.A." refer to the Appendices to petitioner's and the Board's briefs filed in the court below.

[2] United Brotherhood of Carpenters and Joiners of America, Carpenters Union No. 2292.

B.A. 81–82). Shortly thereafter 3 more employees signed authorization cards, making a total of 20 of the Company's non-supervisory employees (R. 40).

On Friday, June 17, having acquired authorizations from a majority of the employees,[3] Union Representatives Conary, Pittman, and Wells called on petitioner's Resident Manager, James Overman (R. 68, 40; B.A. 84–85). Conary informed Overman that the Union represented a majority of the employees and wished to negotiate a contract for them. In response to Overman's questions, Conary explained the provisions of the type of contract usually negotiated, the manner in which negotiations were carried on, and the method by which a proposed contract would be ratified by the employees (R. 40–41; B.A. 85–88, P.A. 59a–61a). Among other things, Overman asked for and got an explanation of various types of election procedures for determining whether a union represented a majority of employees, although he at no time questioned or intimated doubt as to the Union's majority status (R. 40–41, 68; B.A. 87, 90, P.A. 59a).

In response to the request for negotiations, Overman explained that he did not have authority to give the Union representatives a definite commitment, but that, if they would return the following week, he would have an answer for them from petitioner's home office in Elkhart, Indiana. It was agreed that the Union representatives would return on Tuesday, June 21 (R. 69, 41; B.A. 86, 96–97, 103). The con-

[3] The Board found that the appropriate unit contained 33 employees; it excluded 4 other employees as supervisors (R. 71, 38–39; B.A. 66–70, 71–72, 73–74, P.A. 29a).

ference concluded, after more than an hour, with the understanding that Conary would immediately provide Overman with a copy of the type of contract usually negotiated by the Union (R. 41; B.A. 88, 91).

After the Union representatives left, Overman phoned petitioner's President Arthur Decio, at the Elkhart office, and reported their visit. Decio told Overman that he did not have authority to negotiate with the Union since he was not an officer or director of the Company, and directed him to forward the contract to Elkhart as soon as it was received. When Overman advised Decio of the meeting scheduled with the Union representatives for the following Tuesday, Decio replied that there would be no point in keeping the date in view of Overman's lack of authority to negotiate (R. 41; P.A. 68a, 76a).

Later that afternoon on June 17, Plant Manager Kriescher was called to a phone in the production area to answer a call form the Elkhart office. In the course of the conversation, Kreischer assured the Elkhart office that, "Yes, sir, we know approximately how many," and, "Yes, we definitely know who the instigators are" (R. 69, 42; B.A. 76–77, P.A. 43a–44a, 53a). Thereafter, Kreischer informed the employees that there would be a meeting at the time clock at quitting time. When the men assembled there, Kreischer announced that due to lack of sales there would be a layoff. He then called off the names of those employes who would continue working; any employee whose name was not called was considered laid off (R. 69, 41; P.A. 1a, B.A. 26–27, 75). Sixteen men were laid off, 8 of whom had signed Union cards

(R. 69, 71–72). Two more employees, both of whom had signed Union cards, were laid off on June 20 (R. 69).

Kreischer paid a visit on Saturday, June 18, to Luzader, a laid-off employee, at his home. Kreischer asked him what he thought of the Union. Receiving a non-committal reply, Kreischer asked if Luzader's friend, Haroff, had signed up. Luzader indicated that he did not believe Haroff had. But in response to further questioning, Luzader revealed that he himself had joined after the layoff. When Kreischer then asked if he knew who the instigators were, Luzader replied that he did not (R. 69, 44; B.A. 9–10, P.A. 1a–2a).

On Monday, June 20, Kreischer and Overman spoke to all the employees both individually and in groups, concerning the selection of the Union as their bargaining representative (R. 44; B.A. 95, 10–12, 32–33, 52–54, P.A. 70a–71a, 2a–3a, 8a–9a, 11a). In the course of these talks, Kreischer assured employee Watts, "that it didn't matter if I had signed a card or not, that when election time came if I didn't vote" (R. 44; B.A. 60–61, P.A. 12a–13a, 55a). Similarly, Overman cautioned employee Hardin, "Ben, for your own good, don't sign anything that is going to hurt you or that you will feel sorry for later on" (R. 44; B.A. 64). Petitioner also sent letters, both to the employees still working and to those laid off, expressing its opposition to the Union (R. 44; B.A. 4–7, 106–113).

On the morning of June 21, Union Representative Pittman called Overman to inform him that Conary would not be able to arrive in time for the meeting

scheduled for 10 o'clock and to request that it be postponed until one or two o'clock that afternoon. Overman replied that he had received "strict orders not to discuss, meet or have any affair, any business concerning union activities at this time" (R. 42; B.A. 92). When Pittman protested that the meeting had already been arranged and he could no longer reach Conary, Overman stated, "There will be no meeting period," that "my instructions from higher up has instructed me no" (*ibid.*).

On June 23, Overman again talked to petitioner's president about the Union. Decio told him that Davidow, petitioner's counsel, would arrive the next day to discuss matters with the Union. On June 24, Overman, while driving to the plant with Davidow, stopped at the post office for the mail. When Davidow learned that it included a registered letter from the Board containing unfair labor practice charges which had been filed by the Union, Davidow concluded that there was no purpose in trying to negotiate (R. 43).

b *The Board's conclusions and order.*—The Board concluded that the questioning of Luzader and the warnings given to Watts and Hardin constituted restraint and coercion, in violation of Section 8(a)(1) of the Act (R. 68, 50). Finding that the Union represented a majority of the employees at the time of its request for negotiations and that petitioner did not question that fact, the Board further concluded that the Company's refusal to bargain with the Union upon its demand violated Section 8(a)(5) and (1) (R. 68, 51). Finally, the Board concluded that the layoffs of June 17 and 20 were motivated by the union

membership and activities of the employees, and therefore violated Section 8(a)(3) and (1) (R. 73). The Board entered an appropriate remedial order (R. 74–77).

c. The court of appeals' decision.—The court of appeals held that substantial evidence did not support the Board's finding that the layoffs of June 17 and 20 were discriminatorily motivated (Pet. 16, 18–23). However, the court enforced the remainder of the Board's order, concluding that the "Board had more than ample evidence before it to sustain its findings that Skyline Homes engaged in interrogation and warning of its employees in violation of Section 8(a)(1); and it could scarcely have reached any conclusion other than that there was a wrongful refusal to bargain" (Pet. 27).

ARGUMENT

1. Petitioner's contentions that it did not coercively interrogate or threaten its employees and that it did question the Union's majority status (Pet. 6, 11) are contrary to findings of the Board which were sustained by the court of appeals (*supra*, pp. 6–7). Such evidentiary issues do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, it is clear that the record amply supports the Board's findings. Section 8(a)(1) of the National Labor Relations Act prohibits an employer from restraining or coercing employees not to join a union or engage in other concerted activities. The persistent questioning of employee Luzader as to the identity of the Union leaders and the warnings

to employees Watts and Hardin (*supra*, p. 5) are classic forms of restraint and coercion barred by Section 8(a)(1) of the Act.

If a union claiming to represent a majority of employees asks an employer to bargain, the employer must do so unless the employer doubts in good faith that the union in fact represents a majority of employees (see the cases cited in the court of appeals' opinion, Pet. 24, 26). The evidence shows that petitioner did not doubt in good faith the Union's majority status. As the court of appeals noted, it is undisputed that "Union representative Conary told Overman that his organization represented a majority of the employees," and that Overman, although he may have questioned the Union's majority status "in my own mind," did not "pursue the subject or request them for proof that they did have the majority" (Pet. 25). And, thereafter, "the company's behavior was wholly inconsistent with the entertaining of a good faith doubt. Overman requested and received a contract from the union and sent it on to Decio; the company sent its counsel to Ocala to take some action in regard to the union, presumably to negotiate" (Pet. 25).

Nor can petitioner overcome the force of these facts by suggesting that the unfair labor practice charges filed by the Union prevented it from testing the Union's majority in a Board election. A Board election is not the only means by which a union may demonstrate that it has the support of a majority of the employees and, unless the employer has a good faith doubt as to the union's majority (which, as we

have seen, was not the case here), he may not properly refuse to bargain pending a Board election (see cases cited at Pet. 24, 26).*

2. Petitioner challenges (Pet. 11) the propriety of the Board's order requiring the Company to bargain with the Union on the ground that only four of the original employees who designated the Union are still working for it. Even if this be so, it affords no basis for relieving petitioner of its obligation to bargain with the Union. It is well settled that, where there has been a "lapse of time between the occurrence of the unfair labor practices and the Board's final decision and order, * * * enforcement should [not] be either denied altogether or conditioned on the holding of a new election,", even if the union has since been repudiated by a majority of employees. *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 748, note 16; accord, *National Labor Relations Board* v. *Progressive Mine Workers*, No. 597, this Term, reversed on petition January 6, 1964, *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702; *National Labor Relations Board* v. *P. Lorillard Co.*, 314 U.S. 512. As the court of appeals said "an employer will not be permitted to dissipate the union's majority by a series of Section 8(a)(1) violations and then demand that an election be held" because of the lapse of time (Pet. 27).

*Petitioner's claim (Pet. 9-10) that the instant case is in conflict with *International Ladies' Garment Workers Union* v. *National Labor Relations Board*, 366 U.S. 731, is plainly erroneous. That case involved recognition of a union which represented only a minority of the employees, whereas here it is undisputed that the Union represented a majority of the employees at the time it sought recognition.

CONCLUSION

For the above stated reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LAURENCE S. GOLD,
Attorney,
National Labor Relations Board.
JANUARY 1964.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> SEC. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *.
>
> * * * * *